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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EDDIE BYRON PIERCE, JR.,

Plaintiff and Appellant,

v.

HENRY LIMING WANG et. al.,

Defendants and Respondents.

B288181

(Los Angeles County  
Super. Ct. No. BC598423)

APPEAL from a judgment of the Superior Court of Los Angeles, Michael B. Harwin, Judge. Reversed.

Law Offices of Lee Arter, Lee Arter, and Steven M. Karp,  
for Plaintiff and Appellant.

Law Offices of Kim L. Bensen, Cortney Carr; Pollack, Vida  
& Barer and Daniel P. Barer, for Defendants and Respondents.

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Following a personal injury jury trial, plaintiff Eddie Pierce, Jr. was awarded \$61,382.00 in damages for medical expenses and lost wages resulting from injuries Pierce sustained when his automobile was rear-ended by another car. The jury did not award Pierce any noneconomic damages for pain and suffering. Following trial, Pierce moved for a new trial or, in the alternative, additur solely as to the issue of pain and suffering damages, arguing the verdict's failure to compensate him for such damages was inadequate as a matter of law. The trial court erroneously denied this motion, and we reverse.

## **BACKGROUND**

### **A. The Accident and Pierce's Medical Treatment**

On February 14, 2014, defendant Henry Wang rear-ended Pierce while driving defendant Juan Du's car. Defendants admitted liability. Both Pierce and a police officer who responded to the accident testified Pierce complained of pain in his head, waist, and back while at the scene of the accident. After the accident, Pierce was taken by ambulance to the emergency room. At the hospital, Pierce was x-rayed, administered pain medication, and had his neck immobilized. Pierce was instructed to follow up with his personal doctor, and discharged.

Pierce visited Dr. Hunt, his personal doctor, five days after the accident due to ongoing pain in his neck, shoulders, and back. Dr. Hunt ordered an MRI of Pierce's left shoulder. Medical experts for both plaintiff and defendants agreed this MRI, taken a little over a month after the accident, showed a tear in Pierce's

left rotator cuff.<sup>1</sup> Pierce received chiropractic care for his injuries from February 14, 2014 to May 23, 2014, and was placed on a three-month disability leave from work.

Between April 8, 2014 and the commencement of trial in 2017, Pierce saw an orthopedic doctor eight times for pain in his neck and left shoulder. On April 8, 2014, that doctor injected Pierce's left rotator cuff with pain and anti-inflammatory medicine, and prescribed physical therapy. Although the orthopedist released Pierce from treatment on January 5, 2015 after seeing a positive response to the injection and therapy, Pierce returned on November 17, 2015 with renewed pain.

On March 1, 2016, Pierce's left rotator cuff was again injected with pain and anti-inflammatory medicine. This second injection only gave Pierce pain relief for eight days. Pierce returned to the orthopedist two weeks later. At that point, citing Pierce's persistent shoulder pain, positive impingement testing, and the failure of conservative treatment options, the orthopedist recommended exploratory surgery, which the orthopedist testified would likely alleviate Pierce's pain 80 to 90 percent. The recommended surgery cost approximately \$32,000. The orthopedist recommended surgery even though Pierce's range of motion had normalized by his March 15, 2016 visit.

Defendants' medical expert testified that the rotator cuff tear healed on its own following the initial MRI, Pierce likely recovered from any soft tissue injuries he may have sustained within three months of the accident, and there was no need for him to undergo the proposed exploratory surgery. Defendants'

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<sup>1</sup> Plaintiff's second medical expert did not identify such a tear in the MRI.

expert examined Pierce two years after the accident, and testified that during the examination Pierce described his shoulder pain as “inconsistent.” Defendants’ medical expert further testified Pierce showed signs of pain in response to the first test the expert administered, but no signs of pain the second time he was given the identical test.

### **B. Defendants’ Impeachment Evidence**

Plaintiff and his family testified at trial that Pierce’s shoulder pain was debilitating and prohibited him from holding his infant daughter in his left arm for very long, or from engaging in his hobbies of scuba diving and fixing cars. Defendants impeached this testimony with pictures and videos of Pierce holding his daughter in his left arm, scuba diving, and fixing cars during the time period Pierce testified he could not do any of those things. These pictures and videos were from February 2015 (one year after the accident) through trial. Defendants also introduced pictures of Pierce attending baseball games, concerts, and amusement parks. The first of these pictures showed Pierce attending a baseball game in June 2014 (four months after the accident).

### **C. The Jury’s Verdict**

The jury found Wang’s negligence was a substantial factor in causing Pierce’s injuries. It awarded Pierce \$22,682.00 in past medical expenses, \$32,000.00 in future medical expenses, and \$6,700.00 in past lost wages, for a total economic damages award of \$61,382.00. This was the precise amount requested by plaintiff for each of the three categories. The jury awarded Pierce \$0 for past or future noneconomic loss, including physical pain and mental suffering and loss of enjoyment of life.

#### **D. Pierce's New Trial Motion and Request for Additur**

Following the verdict, Pierce moved for new trial, or in the alternative, additur. Pierce argued the damages awarded were inadequate as a matter of law because the jury found the defendants liable for all medical expenses from the injuries he sustained, and those injuries necessarily resulted in pain and suffering. Defendants opposed the motion, arguing the jury's failure to award pain and suffering damages resulted from conflicting evidence as to the nature and extent of Pierce's injuries, including the impeachment of Pierce's testimony about the extent of his injuries.

The trial court agreed with defendants and denied the motion, citing the conflict between the parties' medical opinions and the impeachment of the plaintiff's credibility. Pierce timely appealed.

### **DISCUSSION**

#### **A. Standard of Review**

We review the trial court's denial of a motion for new trial and request for additur for abuse of discretion. (See *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 584 (*Haskins*); see also *Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 558 (*Miller*).) "In determining whether there was an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered." (*Miller, supra*, 212 Cal.App.2d at p. 559.) "A new trial shall not be granted upon the ground of . . . inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly

should have reached a different verdict or decision.” (Code Civ. Proc., § 657.)

**B. Sufficiency of the Record and Adequacy of Appellant’s Brief**

As a preliminary matter, defendants assert Pierce has forfeited his appeal by failing to provide an adequate record of the trial proceedings. While plaintiff provided a clerk’s transcript and a reporter’s transcript of the new trial/additur motion, he did not include any reporter’s transcripts from the trial proceedings. Defendants argue these trial transcripts are necessary because plaintiff’s record lacks much of the trial evidence impeaching plaintiff’s credibility and casting doubt on his injury. Although resolution of this appeal requires analysis of the facts presented at trial, the clerk’s transcript includes the briefing on the new trial motion, in which both sides summarized the trial evidence. The record before us therefore contains sufficient uncontradicted facts to “undertake a meaningful review of [the] argument on appeal.” (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; cf. *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575.)<sup>2</sup>

When an appellant argues insufficiency of the evidence, he or she is “ ‘ “required to set forth in [his or her] brief *all* material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed to be waived.” ’ ” (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 749, italics in original.) Pierce has not done that, and thus waived any

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<sup>2</sup> Pierce’s opening brief contains various factual allegations without any record citations. We have disregarded any such assertions not in fact supported by the record.

argument regarding the sufficiency of the evidence supporting the jury's verdict. He has not, however, waived his argument that the jury's verdict was inadequate as a matter of law. (See *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887 [deeming plaintiff's argument of insufficient evidence to support the verdict waived because of a highly selective recitation of the record, but reviewing the rest of plaintiff's arguments]; see also *Haskins, supra*, 252 Cal.App.2d at pp. 582–585 [appellate court not provided trial transcripts, but review appropriate where uncontradicted facts demonstrated insufficient damage award as a matter of law].)

**C. The Jury's Verdict Awarding No Pain and Suffering Damages Was Inadequate as a Matter of Law**

“[J]ury awards which fail to compensate for pain and suffering are inadequate as a matter of law” when “the right to recover was established and . . . there was also proof that the medical expenses were incurred because of defendant's negligent act.” (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 936–937 (*Dodson*).) “In such situations . . . ‘[i]t is of course clear that . . . a judgment for no more than the actual medical expenses occasioned by the tort would be inadequate.’” (*Id.* at p. 937.) Some award for pain and suffering must accompany an award for medical expenses where those medical expenses compensate injuries involving an “unchallenged description” of plaintiff's symptoms (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 896), where the plaintiff had to “undergo[] a serious surgical procedure” in response to the injury (*Dodson, supra*, 154 Cal.App.4th at p. 938), or, more broadly, where “substantial general damages were obviously incurred.” (*Gallentine v.*

*Richardson* (1967) 248 Cal.App.2d 152, 155 (*Gallentine*); see also *Haskins*, *supra*, 252 Cal.App.2d at p. 586.)

On the other hand, there is no error in failing to award pain and suffering damages where the evidence would have supported a finding that the plaintiff did not suffer any substantial injury, or suffered no injury whatsoever. (See *Miller*, *supra*, 212 Cal.App.2d 555, 559; see also *Randles v. Lowry* (1970) 4 Cal.App.3d 68 (*Randles*).) Ultimately, “[e]very case depends upon the facts involved.” (*Miller*, *supra*, 212 Cal.App.2d at p. 558.)

Here, while there were disputes about the severity of plaintiff’s injuries, those disputes did not involve whether Pierce was injured but rather the continuing impact (if any) of those injuries months after they occurred. It was undisputed that Pierce was in an automobile accident that caused him to be taken by ambulance to the emergency room. It was undisputed that an MRI taken one month after the accident showed a tear in his rotator cuff. It was undisputed Pierce was placed on a three-month disability leave from work. It was undisputed that Pierce received an injection in his left shoulder two months after the accident to alleviate pain. The jury awarded Pierce the full amount of economic damages he requested for his past medical expenses and lost wages, as well as for a future shoulder operation.

Considering the evidence in the light most favorable to defendants, defendants’ impeachment evidence raised significant questions about whether Pierce still suffered from any accident related injuries starting some three months after the accident. Defendants’ medical expert testified that any soft tissue injuries



healed within three months of the accident. Four months after the accident, Pierce was able to attend a sporting event. One year after the accident, Pierce was captured on film engaging in activities that he testified he was unable to perform. Approximately two years after the accident, Pierce described his pain as inconsistent, which defendants' medical expert confirmed through testing. Defendants' medical expert further testified an MRI taken approximately two years after the accident showed the rotator cuff tear had healed. In short, this evidence did not impeach or contradict plaintiff's injuries and treatment in the three months following the accident, but instead was directed to later points in time.

While the factfinder was entitled to consider defendants' impeachment evidence to decide the amount of pain and suffering damages, that evidence was insufficient as a matter of law to support a complete denial of such damages. (*Dodson, supra*, 154 Cal.App.4th at p. 933.) Once the jury determined defendants were liable for the injury here and the injury's expenses, the jury must have found that the plaintiff had "endured at least some pain and suffering . . . ." (*Id.* at p. 938; see also *Gallentine, supra*, 248 Cal.App.2d at p. 155 ["an award limited strictly to the special damages is inadequate as a matter of law" when "damage is proven as a proximate result of defendant's negligence, the exact amount of plaintiff's special damages are awarded, and no award is made for the detriment suffered through pain, suffering, inconvenience, shock or mental suffering"].)

The cases on which defendants rely are inapposite, as they involve circumstances where the jury could have found that the plaintiff either suffered a very minor injury or no injury whatsoever. For example, in *Christ v. Schwartz* (2016) 2

Cal.App.5th 440, the plaintiff claimed the onset of fibromyalgia after a minor car accident in which the defendant side swept the plaintiff's car while driving 10 miles per hour. (*Id.* at pp. 443–445.) The plaintiff drove herself home, underwent massage and physical therapy intermittently for a year and a half, and ultimately complained only of neck pain, which she already had a history of prior to the accident. (*Id.* at pp. 443–444.) X-rays and MRI's did not reveal any abnormalities. (*Id.* at p. 443.) The only indication that plaintiff suffered any injury whatsoever was her complaints of pain, which were impeached at trial. (*Id.* at pp. 444–446.) Similarly, in *Randles*, a young boy sustained two lacerations on his face following a car accident, neither of which required stitches. (*Randles, supra*, 4 Cal.App.3d at p. 73.) The court held the jury's verdict awarding exact medical expenses of \$40.50 but no damages for pain and suffering was not inadequate as a matter of law, as there was "no evidence that [plaintiff] suffered any discomfort after the date of the accident." (*Ibid.*)

Finally, in *Miller*, the plaintiff claimed severe injuries following an electrical shock but there was no medical evidence to indicate any burn from the shock. (*Miller, supra*, 212 Cal.App.2d at p. 560.) The court concluded that the evidence presented would "amply support a finding that plaintiff received no injury whatever" and that it was "entirely probable that the jury felt that although plaintiff was entitled to no more than nominal damages, the kindest disposition of the case was to award to her an amount at least equivalent to her medical bills." (*Ibid.*)

Here, in contrast, the undisputed evidence showed that Pierce was in a significant automobile accident, had a torn rotator cuff, was placed on a three-month disability leave from

work, and incurred over \$22,500 in medical expenses to treat his injuries (with an additional \$32,000 for a future operation). Because the award of damages was inadequate as a matter of law, the denial of plaintiff's motion for new trial or in the alternative additur was an abuse of the trial court's discretion.

### **DISPOSITION**

The judgment with regard to noneconomic damages is reversed, and the matter remanded for the trial court to exercise its discretion pursuant to Code of Civil Procedure section 662.5 either to order a new trial limited to noneconomic damages, or to issue a conditional order granting a new trial limited to noneconomic damages unless defendants consent to the addition of damages in an amount the court in its independent judgment determines from the evidence to be fair and reasonable. Plaintiff is to recover his costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.\*

We concur:

JOHNSON, Acting P. J.

BENDIX, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.